Court No.3

Criminal Jail Appeal No. 1809 of 2001

Shamsher Bahadur ……Appellant.

Versus

State ……Respondent

Hon'ble Irshad Hussain, J.

The appellant has been convicted and sentenced to undergo R.I. for 10 years U/S 376 I.P.C., per judgment and order dated 13.1.1999 passed by the then Sessions Judge, Pithoragarh in Sessions Trial No. 28/1997, for having committed rape on Km. Rekha, a minor girl at about 6.20 A.M. on 29-4-1997 in the vicinity of village Kawadi of P.S. Jhulaghaat, District Pithoragarh.

Briefly stated the prosecution case is that on 29-4-1997 at about 6.20 A.M. prosecution Km. Rekha aged about 12 years a student of class 6th was going to her school in Jhulaghaat and at that time she was accompanied by her mother Smt. Harna Devi who went to collect hay and grass for she-goat. They had left their house in village Birkham. At a distance of about one kilometer from the village Smt. Harna Devi stopped for collecting grass whereas her daughter Km. Rekha left her company for her school. Soon after Smt. Harna Devi heard shriek of her daughter and when she rushed towards her she found accused Samsher Bahadur committing rape on Km. Rekha. Accused was holding a stone in his hand to put the prosecutrix to a threat of hurt. Smt. Harna Devi raised an alarm where-upon the accused ran away from there. Km. Rekha was crying with pain and she narrated the incident to her mother. The information was given to girl's father Nain Singh who was on his duty. On his return he lodged the first information report next day on 3-4-1997 at 19.20 hrs.

On registration of the case investigation was taken up by S.I. J.P. Bansla who recorded the statement of the witnesses. He seized the clothes of the prosecutrix vide memo, Ex.Ka.1 and prepared the site-plan of the place of the occurrence, Ex.Ka.8. The accused was arrested on 1.5.1997 and his under-wear was seized vide memo, Ex.Ka.9. On completion of the investigation charge sheet, Ex.Ka.10 was submitted against the accused U/S 376 I.P.C.

The accused pleaded not guilty to the charge and submitted that he was falsely implicated for the sake of the honour of the family of the prosecutrix because one Hari Prasad Tamta of the village was seen by the villagers committing rape on the prosecutrix and he was falsely roped in when he raised an alarm on witnessing the incident.

At the trial prosecution examined prosecutrix Km. Rekha (P.W.1), her mother Smt. Harna Devi (P.W.2), informant Nain Singh (P.W.3). Dr. (Ms.) Nirmala Punetha (P.W.4) who had medically examined Km.Rekha on 1.5.1997 and who proved medical examination report, Ex.Ka.3 and supplementary report, Ex.Ka.4, Dr. S.C. Pathak (P.W.5) Radiologist who has proved the x-ray report of the prosecutrix, Ex.Ka.5 and S.I. J.P.Bansla (P.W.6), the Investigating Officer of the case.

In defence Naween Chand Gahtodi (D.W.1) who was the principal of the school where Km.Rekha was the student was examined to show that Km. Rekha remained present in school on 29th and 30th April 1997 and support the school attendance register was produced by him.

On the basis of the evidence on record learned Sessions Judge placed reliance on the evidence of the prosecutrix and corroborative evidence of her mother as well as medical evidence and found the charge proved against the accused and convicted and sentenced him as mentioned above.

Heard Sri Kailash Chandra Tewari Amicus Curiae for the accused-appellant and learned A.G.A. and heave carefully proved the evidence in the case.

The learned Amicus Curiae first of all submitted that the evidence on record about the age of the prosecutrix has not been properly appraised by the learned Sessions Judge and that in fact the prosecutrix Km. Rekha was a girl of more than 16 years and her evidence indicate that if at all there was sexual intercourse with her the same was not without her consent, and therefore the case does not fall within the definition of rape as given in section 375 of the Indian Penal Code.

It need to be stated that the evidence of informant and his wife about the age of the prosecutrix Km. Rekha stand corroborated by the medical evidence as the same affirmed that the age of Km. Rekha was between 13-14 years. The x-ray of the wrist and elbow joints was taken by, P.W.5, who prepared the report, Ex.Ka.5 and on its basis as well as the supplementary

report, Ex.Ka.4 proved by P.W.4 the opinion about the age was given. There is absolutely nothing in the cross examination of P.W.4 and P.W.5 which may in any way assail their expert opinion that he age of the prosecutrix Km. Rekha was between 13-14 years. The evidence on record is thus clinching on this issue and the learned Sessions Judge has also rightly inferred that the age of Km.Rekha at the time of occurrence was less than 16 years and she could not have acted out of her own free will and consent in the matter of any companionship with the accused. In view of this the submissions of learned Amicus Curiae have no force and if the evidence of the prosecutrix is found to establish that she was subjected to sexual intercourse the case will be squarely covered by the definition of rape in section 375 I.P.C.

In this case the proesecutrix Km. Rekha(P.W.1) gave categorical statement that on 29-4-1997 when she left the company of her mother on way to her school the accused Shamsher Bahadur appeared near the water stream and gave her Rs. 20/- to fetch some items from Jhulaghaat. On her refusal accused caught her and forcibly took her aside from the path way and at a little height. She wanted to raise an alarm but her mouth was gagged by the accused and who even picked up atone and threatened her. The accused then removed he panty and Salwar and forcibly committed rape on her. Any how on her shriek her mother Smt. Harna Devi (P.W.2) happened to reach there where-upon the accused fled away giving threat to her and her mother.

The learned Amicus Curiae drew attention to the statement of the prosecutrix which is to the effect that she was made to lie on a big stone by force by the accused and submitted that inspite this no external injury on the body of the victim was detected by the Medical Officer and that this aspect of the matter falsify her evidence. No doubt the prosecutrix has not received any external injury on her body as is evident from the medical evidence but it would not deteract from placing reliance on her evidence which is otherwise wholly reliable and inspire confidence. There is absolutely nothing material in her cross-examination as may show that she told a lie and falsely implicated the accused in the case. No material contradiction in her evidence also could be brought on record and therefore the learned Sessions Judge was also justified in placing reliance on her evidence.

It is well settled that even solitary testimony of the prosecutrix can be relied upon to convict the culprit if her evidence inspire confidence. Since the evidence of the prosecutrix is wholly reliable no corroboration was at all required in this case. Even otherwise the evidence of her mother Smt. Harna Devi (P.W.2) corroborate her evidence as she stated that on the day of occurrence she had heard the cries of her daughter Km. Rekha when she was collecting the grass nearby and on reaching there found the accused Shamsher Bahadur committing rape on her daughter. She also stood the test of cross examination and there is nothing as may in any way assail her testimony about the actual occurrence.

Not only the above oral evidence but the medical evidence also fully support the claim of the prosecutrix in this case. As proved by the evidence of Dr. (Ms.) Nirmala punetha the hymen of Km. Rekha was found torn recently which was red, tender and inflamed at the time of the examination on 1.5.1997. According to her vagina admitted one finger with difficulty and that the hymen was reptured by penetration which was evident by the tenderness of the posterior formix. She denied to the suggestion that since there was not bleeding at the time of insertion of the finger during the medical examination the chances of penetration stand ruled out. The reason given by her was that it is not necessary that if hymen was torn there would necessarily be bleeding when finger is inserted in the vagina. Thus there is nothing in her cross examination which may in any way dispute her expert opinion and reliability of the evidence that it was a case of sexual assault on the victim Km. Rekha. The evidence on record was thus clinching on the matter in issue and the learned Sessions Judge was therefore right in coming to the conclusion that Km. Rekha was subjected to sexual intercourse against her will and consent by the accused.

Attention was also drawn to the evidence of informant Nain Singh to bring home the point of view that there was delay in lodging the F.I.R. This aspect of the matter has also been considered in proper perspective by the learned Sessions Judge and nothing of significance could be pointed out as may entail rejection of the prosecution version and evidence on account of the fact that the F.I.R. got to be lodged next day of the occurrence. It is not one of such cases in which delay in lodging of the F.I.R. would be fatal and prosecution case would be thrown away as being unreliable.

So far as the defence evidence is concerned the same was found infirm and inconsistent in view of the fact that the attendance register did not have its entries certified by the class teacher and that the principal had also made a note that the teacher should verify the entries of the attendance of the students in the class. D.W.1 has even stated that he could not say as to whether the attendance register is authentic and reliable or not. He even conceded that there was some negligence in making the entries in the attendance register of the school and considering the evidence of the defence witness it was rightly disbelieved that Km. Rekha remained present in her school both on 29th and 30th April 1997. In fact the attempt of the defence to make a dent in the prosecution version and its evidence has miserably failed and note of this was rightly taken up by the learned Sessions Judge also.

In the statement U/S 313 of the Code of Criminal Procedure the accused had taken a strange plea that some one else has sexually assaulted the victim of the case and to save the honour of the family he was falsely implicated in the crime. It does not stand to reason as to how the honour of the family was to be saved by implicating the accused instead of the real culprit. The plea can only be said to be a flight of imagination and in fact there is absolutely nothing to create any doubt in the claim of the prosecution.

For the above reason it is evident that the evidence on record and the circumstances of the case have been appraised and considered in correct legal frame-work and the conclusions arrived at by the learned Session Judge are just and warranted by the material on record. In other wards the accused-appellant was rightly held guilty of committing rape on Km. Rekha and was accordingly convicted U/S 376 of the Indian Penal Code.

It was lastly submitted that the sentence awarded is excessive. Considering the facts and circumstances and the age of the victim the sentence of R.I. for 10 years cannot be said to be harsh and excessive and no interference is also warranted on the point of sentence awarded to the accused-appellant.

The appeal fails and is dismissed accordingly. The judgment and order dated 13-1-1999 convicting and sentencing the accused-appellant to

undergo 10 years R.I. U/s of Indian Penal code id hereby affirmed.

Learning Amicus Curiae shall be paid fee as prescribed.

(Irshad Hussain, J.)

Dated: 21-8-2003

ISB